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In The Supreme Court Of The United States

OCTOBER TERM, 1972

NO. 72-1412

HUEY P. NEWTON
and ROBERT L. BAY,
Petitioners,

vs.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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PROCEEDINGS BELOW

The judgment that the petitioners seek reviewed was entered by the appellate department of the Alameda County Superior Court on January 24, 1973 (Pet., Exh. 3). Certification to the California Court of Appeal was denied on February 9, 1973 (Pet., Exh. C).

JURISDICTION

The petitioners invoke the jurisdiction of this Court under title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Whether the case is properly before this Court.

2. Whether an officer serving an arrest warrant for, *inter alia*, carrying a concealed weapon may remove from the arrestee/driver's side of the car a case from the floor of the car between the arrestee's feet and, feeling a bulky object like a weapon, may open the case and remove the weapon when he has previously been told the arrestee carried the weapon in just such a case.

STATEMENT OF THE CASE

The petitioners were charged in Municipal Court of the State of California, Oakland-Piedmont Judicial District, Alameda County, with violations of California Penal Code sections 12025 (carrying a weapon concealed) and 12031 (carrying loaded firearms) (Pet., p. 5). A hearing to suppress evidence under California Penal Code section 1538.5 was held on August 17, 1962, and denied on September 5, 1972 (Pet., Exh. A).

Petitioners appealed this denial of their motion to the appellate department of the Superior Court of Alameda County, California. The municipal court order was affirmed on January 24, 1972. Certification to the California District Court of Appeal was denied on February 9, 1973 (Pet., Exh. C). A petition for stay was presented to Mr. Justice Douglas on April 20, 1973, and denied. The petition for writ of certiorari was filed on April 18, 1973, and opposition was requested on May 31, 1973.

The case is set for trial on August 22, 1973.

STATEMENT OF FACTS

On April 27, 1972, warrants were issued for the arrest of the petitioners for battery (Cal. Pen. Code § 242), and drawing or exhibiting a firearm (Cal. Pen.

Code § 417). Mr. Bay was also charged with carrying a concealed weapon (Cal. Pen. Code § 12025). These warrants arose out of attack by the petitioners on Mr. Alonzo Miller.

Later that day, at about 4:00 p.m., Sergeant Robert Farkas and other officers were in the vicinity of 1200 Lakeshore Avenue, Oakland. His purpose was to make arrests pursuant to these warrants (RT 4).[1] He saw a brown Mercury Brougham automobile being driven by Mr. Bay. Next to him was a young woman. Mr. Newton was seated in the rear seat (RT 7). Sgt. Farkas and Lt. Fugler were standing on the driver's side of the vehicle (RT 8, 28). They looked in the automobile and saw among other things a vinyl-type case, 18" by 12" (RT 15), on the floor of the car between Mr. Bay's feet (RT 8). Mr. Miller, the complainant and the victim in the original case, had told Sergeant Farkas that when he had been pistol-whipped, the weapon had been removed from a case of a similar color and shape (RT 14). Sergeant Farkas ordered Mr. Bay out of the automobile and then removed the case. As he removed the case, he could feel that it contained a bulky object inside which felt like a weapon. He lifted the flap and discovered a weapon inside (RT 14). It was a hand gun, blue-steel in color, with brown wooden grips (RT 17). It was a 9 mm. weapon. The clip was loaded. There was a round in the chamber (RT 18). The sergeant testified that he looked into the case since he was "ninety-nine and nine-tenths" sure there was a weapon in

[1]The respondent has obtained a copy of the reporter's transcript of the proceedings at the motion to suppress evidence and has lodged this with the Clerk of the Court.

there (RT 33).

ARGUMENT

I

THERE IS NO FINAL JUDGMENT. THE PETITION IS PREMATURE.

The petitioners invoke the jurisdiction of this Court under title 28, United States Code, section 1257 (3) (Pet., p. 2).[2] That statute provides that the writ of certiorari is available under circumstances therein outlined but only to review final judgments or decrees. 28 U.S.C. § 1257. The respondent submits that the order of the municipal court now sought to be reviewed is an interlocutory one only. It is not final. The petition is therefore premature and should be denied.

The petitioners quote California Penal Code section 1538.5(j) (Pet., Exh. E) which provides for an interlocutory appeal in misdemeanor cases from the order of a municipal court relating to the return of property seized and the suppression of evidence relating thereto. They then aver that such an appeal is binding on them (Pet., p. 3). The quotation is not complete. The last sentence of the statute at issue omitted from the excerpt quoted in Exhibit E goes on to read:

> "... . If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding on them." (Cal. Stats. 1967, ch. 1537, p. 3652, § 1)

This sentence clearly makes interlocutory appellate review binding on the People, but it does not purport to bind a defendant in a criminal case.

In *People* v. *Medina*, 6 Cal.3d 484, 99 Cal. Rptr.

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[2]The petitioner's reliance on 28 U.S.C. 28 1247(3) appears to be but a typographical error.

630, 492 P.2d 686 (1972), the California Supreme Court held in a felony case that the denial of a motion to suppress evidence under California Penal Code section 1538.5 and subsequent denial of an appellate writ without opinion was not a conclusive determination on the merits of a challenged search and seizure and did not preclude further review of that issue on appeal from an ensuing judgment of conviction. The respondent submits that the petitioners' Exhibit B does not reflect a decision on the merits. This ruling by the Appellate Department of Alameda County Superior Court is therefore not binding on them on their appeal from any judgment of conviction which they may suffer in the future.

The California Supreme Court went on to state even if, in the course of denying the petition for an interlocutory writ, a California appellate court did give full reasons in a written opinion after full oral argument, that denial is not res judicata. It pointed out that the statute permitted the defendant, as opposed to the People,[3] to seek further review of the validity of the search on appeal from the judgment of conviction, a concept totally at variance with the application of the doctrine of res judicata. *Medina*, *supra* at 492. At most, the interlocutory opinion of the reviewing appellate court may be considered the law of the case since the review is interim appellate review by writ in lieu of appeal. But, in applying this latter concept the California Supreme Court has abjured the lower courts to:

"....[K]eep in mind that 'the law of the case,

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[3]The respondent notes that under Penal Code section 1538.5 and the decisions of the California Supreme Court, a defendant's interests are protected to a greater extent than are those of the People. *People* v. *Superior Court*, 6 Cal.3d 757, 100 Cal.Rptr. 281, 493 P.2d 1145 (1972).

which is merely a rule of procedure and does not go to the power of the court, has been recognized as harsh, and will not be adhered to where its application will result in an unjust decision' [citation omitted]." *People* v. *Medina*, *supra*, at 492.

The respondent therefore respectfully submits that contrary to petitioners' conclusory statement, the ruling by the appellate department of the Alameda County Superior Court is not binding on them and there is no final order of the highest state court ripe for review. 28 U.S.C. § 1257.

But even if it be considered for the sake of argument that the interlocutory order of the appellate department be a final one, the case is not ripe for decision by this Court. It does not follow that because the evidence complained of is admitted that the petitioners will be convicted. The evidence against the petitioners has not been presented to a jury. There are questions of criminal knowledge, possession and control, and credibility. Very properly, the People are not aware of the direction which a presumably spirited defense will take, but it is certain that the petitioners have not yet pleaded guilty. Were the petitioners to concede that a finding of their guilt was inevitable and thus bind themselves to the position that in the event that the complained of evidence is ruled admissible on the present record, such a ruling would remove any defense they might have in a California trial court and that furthermore their right to appeal subsequent to conviction has been effectively removed, then perhaps such concessions[4] would effectively reduce further proceedings in this case to:

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[4]The constitutional propriety of such concessions would be doubtful absent precautions of the caliber deemed mandatory in *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

"...[A] few formal gestures leading inexorably towards a conviction, and then another appeal to the...[California] Court for it formally to repeat its rejection of . . . [the] constitutional contentions whereupon the case would wind its weary way back...as a judgment unquestionably final and appealable...." *Mills* v. *Alabama*, 384 U.S. 214, 217 (1966).

This is, however, not our case. To the contrary, there is, thus far, merely a pre-trial evidentiary ruling, though admittedly on a constitutional basis. It could be that a ruling favorable to the petitioners would make the People's burden of proof well nigh impossible to discharge, but it does not follow that an unfavorable ruling will necessarily result in a conviction. In effect, the petitioners seek two bites of the apple. This, the respondent submits, may well be understandable but it is hardly supportable. The respondent submits that full and binding review at this time would result in

"...a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets....[footnote omitted]" *Mills* v. *Alabama*, *supra* at 217, 218.

The respondent therefore submits that because the ruling sought to be reviewed is interlocutory, as such it is not properly before this Court.

II

THE SEIZURE OF THE SATCHEL AND OF THE HAND GUN IT CONTAINED WAS PROPER.

A. It was both incident to an arrest and in protection of the arresting officers.

The uncontraverted testimony is that the search took place contemporaneously with the arrest of Mr.

Bay and Mr. Newton pursuant to valid arrest warrants (RT 4). It will be recalled that the vinyl case was in plain view between petitioner Bay's feet. Moreover, the satchel was similar in color and shape to the one from which the gun was taken by Mr. Bay when he pistol-whipped his victim Mr. Alonzo Miller. Thus the case itself was known to the officer to be at once evidence of the crime of which Mr. Bay was charged and also, the container of a weapon carried by Mr. Bay. In *Chimel* v. *California*, 395 U.S. 752, 762, 763 (1969), this Court stated:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested to remove any weapons that the latter might use in order to resist arrest or effect his escape. Otherwise, the officers' safety might well be endangered and the arrest frustrated. In addition it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification therefore for a search of the arrestee's person and the area 'within his immediate control'-construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence."

The petitioners insist that "plain view" alone will not justify a search and that in any event the doctrine has no application to this case citing *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Though the interpreta-

tion of the rule of that case is not without difficulty, see *e.g.*, *North* v. *Superior Court*, 8 Cal.3d 301, ____ Cal. Rptr.____, ____ P.2d ____ (1972), it seems clear that under any interpretation of its effect, the plain view doctrine at the very least permits the seizure by an officer of evidence which he inadvertently discovers when he is where he has a right to be. *Id.*, plurality opinion at p. 466. On this point, even the dissenting opinion in *North* v. *Superior Court*, *supra* at 316, agrees. This is our case and the officers' actions were justified.

The respondent therefore submits that under the rule of *Chimel* v. *California*, *supra*, the seizure of the vinyl case was justified.

The petitioners rely on *United States* v. *Tate*, 209 F.Supp. 762 (D.C. Del. 1962), for the proposition that because Mr. Bay had been ordered out of the car, therefore the seizure of the vinyl case was not justified as being incident to an arrest. In *Tate* the defendant had been arrested for speeding and after offering resistance, was handcuffed and placed in the rear of a locked police car. The police officer made a general search of the automobile and found a shotgun beneath the front seat. In directing a verdict for the defendant, the Court held that "The searcher must have in mind some reasonably specific thing he is looking for and reasonable ground to believe it is in the place being searched. . . . ." *United States* v. *Tate*, *supra* at 765.

In reaching its decision, the district court noted that it was a speeding arrest, the police officer was not looking for means by which the crime had been committed, wasn't looking for weapons and didn't recognize the defendant as having a police record. Indeed the arresting officer was positive that the

arrestee could not escape nor get at weapons concealed in the automobile. Characterizing it as a "close case," the judge therefore ruled it was a general exploratory search.

Our case is very different. There was an arrest pursuant to warrant involving the use of a hand gun, the case was in plain view, it had been used in the original crime to contain a weapon and was evidence thereof and the petitioners were in fact known to the arresting officers to have criminal records. The respondent submits therefore that *Tate* is not controlling.

Closely allied to the petitioners ability to escape is the interest of self-protection for the officers making the arrest. The respondent notes that even where there is neither cause to search nor reason to arrest, there exists the right to protect oneself. Thus, a lesser intrusion known as a pat search is permissible where the officer has grounds to believe the detainee is armed. *Terry* v. *Ohio*, 392 U.S. 1 (1968). This interest is present in arrest situations as well as in "stop and question" situations. It was recognized in *Preston* v. *United States*, 376 U.S. 364 (1964), and cited with approval and replied upon in *Chimel* v. *California*, *supra* at 764. It was minimal in *United States* v. *Tate*, *supra*, because the arrestee had already been handcuffed and placed in a police car by the arresting officer.[5]

B. There was probable cause to search the case.

The petitioners had been stopped in the automobile. The arresting officer at the time of the stop approached the car and saw the vinyl case on the floor between Mr.

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[5]The respondent notes that the petitioners in their cross-examination at the hearing tried hard albeit unsuccessfully to bring themselves under the peculiar facts of *Tate*.

Bay's legs. It was in plain view. Up to this time there had not been any search. The officer knew that Mr. Bay and Mr. Newton had assaulted the victim, Mr. Miller, and that Bay had used a hand gun to pistol-whip Mr. Miller. He also knew that this hand gun had been taken by Mr. Bay from a case of similar shape and color. The respondent therefore submits that it was reasonable for the officer to believe that this vinyl case was not only evidence of a crime but also contained a hand gun. One reasonable inference surely is that Mr. Bay, who it may be noted was accompanying Mr. Newton once more, was in some way acting as Mr. Newton's bodyguard and was carrying a weapon concealed in violation of California Penal Code section 12025.

But even if there was not then probable cause to look inside the case the moment it was first seen by the arresting officer, there was certainly cause to search when the case was picked up. The officer could feel a bulky weapon-like object in it. In his own words, he was ninety-nine and nine-tenths sure it was a weapon.

The cases relied upon by petitioners are readily distinguishable. In *Preston* v. *United States*, 376 U.S. 364 (1964), it was a *later* search *not* incident to an arrest which was condemned because though there was initially cause to arrest there was not subsequently probable cause to search. Of course, if there is probable cause, a search of an automobile appears to be no longer necessarily defective if the automobile is taken from the point of stop to another and more convenient place for the actual search. *Chambers* v. *Moroney*, 399 U.S. 42, 52 (1970). There is no such movement in our case. The California case of *Mozzetti* v. *Superior Court*, 4 Cal.3d 699, 94 Cal. Rptr. 412, 484 P.2d 84 (1971), on which appellant also relies concerns itself to

an inventory listing of the contents of an impounded automobile and holds that sealed containers or compartments may not be entered in the course of such inventory absent cause. Such an impound and search is not at issue in our case. But even under *Mozzetti* if the impounding officer could properly lift up the container and then, because of what he felt, reasonably come to the conclusion that it contained contraband, then such contraband may be seized.

The petitioners appear to complain that because the officer was told on April 21, 1972, of the existence of the vinyl case and that Mr. Bay had taken the pistol from it, the officer should have obtained a search warrant to search the automobile (Pet., p. 11). The respondent notes that we are not faced with a general search of an automobile but with a search of a case. The officer had no pre-warning that the arrest would take place in an automobile. According to the petition (p. 11), it appears that the officers were waiting to serve the warrant in the vicinity of Mr. Newton's residence and, to quote the petitioners, "... . The fact that the arrest occurred while the petitioners were in the vehicle is entirely fortuitous ...." (Pet., p. 11). The respondent therefore submits that petitioners' point is not well taken. On these facts, no search warrant was required.

CONCLUSION

The petition is premature because it attempts to seek review of an interlocutory judgment and not a final one.

Both the vinyl case and loaded gun were evidence of the original crime and seized incidental to an arrest in the automobile. In any event there was probable cause to search the case once it was seen in plain view.

We therefore submit that the petition for certiorari be denied.

DATED: June 25th, 1973.

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